Great American Products *and* International Ladies Garment Workers Union, Local No. 76, AFL–CIO. Cases 13–CA–29766, 13–CA–29875, 13–CA–29905, and 13–RC–18091

September 30, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 23, 1993, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge, deportation, black-balling, and death, and physically assaulting employees in an effort to discourage the employees' union activities.

The Respondent excepts to the judge's decision on the basis that some of the acts found unlawful by the judge were performed by individuals Marta Gomez, Gilberto Vargas, and Armando Frias, whom the judge found to be statutory supervisors, but who the Respondent contends are merely leadpersons with no supervisory authority or status.[2] For the reasons stated below, we adopt the finding that Vargas is a supervisor, and we conclude that Frias is not a supervisor but that he nonetheless possessed apparent authority to engage in the conduct at issue on behalf of the Respondent. We find it unnecessary to pass on the supervisory status of Gomez because the complaint does not allege, nor did the judge find, that she engaged in any unlawful conduct.

1. Vargas is a leadman in the assembly and buffing areas of the production department. According to credited testimony, he was held out by management as a supervisor and the employees working under his direction so viewed him. Based on further credited testimony, the judge found that Vargas assigned work, issued oral warnings, transferred employees among machines and to other departments, granted time off, and effectively recommended that employees be tried in other departments. Because we agree with the judge's further findings that Vargas exercised independent judgment in the performance of those functions and that they were not merely sporadic but occupied a significant portion of his time, we adopt the conclusion that Vargas is not just a skilled leadman, but is a supervisor within the meaning of Section 2(11) of the Act. See, e.g., *Cannon Industries*, 291 NLRB 632 (1988).[3]

2. We agree with the judge that the Respondent is responsible for employee Frias' unlawful activities, even though we are not persuaded that the record supports the judge's finding that Frias is a statutory supervisor. An individual may be deemed a supervisor within the meaning of Section 2(11) of the Act if it is shown that he or she possesses the authority to engage in any one or more of the functions enumerated there and uses independent judgment in exercising such authority. Performance of those functions in a merely routine, clerical, perfunctory, or sporadic manner will not suffice. See, e.g., *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

Frias is a leadman in the casting department. Unlike the case of Vargas, there is no evidence that Frias had independent authority to grant time off, give oral warnings, assign overtime, effectively recommend trying employees in other departments, or transfer employees to other departments. Based on the testimony of one employee, the judge found that Frias instructed the employee to fulfill production or be discharged, assigned new tasks as jobs were completed, gave breaks, checked employees' time in and out, and moved employees from machine to machine. Because, as explained below, Frias exercised this authority within narrow constraints, we do not agree that it is sufficient to establish that Frias is a statutory supervisor.

The record establishes that: the work assigned by Frias was prioritized by management in the daily production schedule; Frias gave routine and normal breaks; Frias moved employees from machine to machine based on fatigue and on production needs; and employees punched a timeclock. With respect to an employee's testimony that Frias told him that he could be fired if he did not meet production goals, the evidence does not show that this observation was a warning of any action that Frias had the power to take or that the admonition itself amounted to discipline. Neither this testimony nor any other record evidence supports a finding that Frias had the authority to discharge

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] The Respondent did not file exceptions to the judge's findings that the Respondent's admitted supervisors engaged in many unlawful acts in violation of Sec. 8(a)(1).

[3] Member Raudabaugh agrees with his colleagues' conclusion (infra) that Frias had apparent authority to act on behalf of the Respondent, and finds it unnecessary to decide whether he is a supervisor.

or effectively recommend the employee's discharge. Unlike the authority exercised by Vargas, Frias' authority was exercised in a routine manner and is insufficient to support a finding that he was a statutory supervisor. *Bowne of Houston*, supra; *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991) (Member Devaney dissenting on other grounds).

Although the record does not sufficiently establish that Frias is a statutory supervisor, the record *does* show that Frias acted as an agent of the Respondent and that his acts are therefore attributable to the Respondent. The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees ''would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management.'' *Waterbed World*, 286 NLRB 425 (1987) (citations omitted). As stated in Section 2(13), when making the agency determination, ''the question of whether the specific acts performed were actually authorized or subsequently ratified should not be controlling.''

In this case, the Respondent introduced Frias to the plant employees as a supervisor and instructed new hires in the casting department to direct their questions and problems to Frias. Although he handled his tasks in a routine manner, the casting department employees looked to Frias for job assignments, breaks, information about production quotas, and requests for time off. In addition, Frias was the only bilingual employee in the casting department and was one of only four bilingual individuals in a 150-member work force. See, e.g., *Cream of the Crop*, 300 NLRB 914 (1990). Finally, Frias' discouragement of union activity was not contrary to the message and acts of the Respondent's admitted supervisors and of Supervisor Vargas. In these circumstances, it is evident that the employees would reasonably believe that Frias was reflecting company policy and acting for management when Frias committed the acts found unlawful by the judge. Thus, we find that Frias acted as an agent of the Respondent with respect to that conduct and that his acts are attributable to the Respondent.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Great American Products, Broadview, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in Case 13–RC–18091 is set aside and the case is remanded to the Regional Director for Region 13 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative, as directed below.

[Direction of Second Election omitted from publication.]

Deborah Schrock, Esq., for the General Counsel.
Bennett L. Epstein, Esq., of Chicago, Illinois, for the Respondent.
Martin P. Barr, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. I heard the consolidated unfair labor practice and representation cases in Chicago, Illinois, on February 27 and 28 and March 16 and 17, 1992, pursuant to complaint issued July 17, 1991, and the Regional Director's order consolidating the representation and unfair labor practice cases issued on January 27, 1992. Charges underlying the complaint were filed the previous October, November, and December 1990. The representation election conducted herein was held on October 5, 1990, with the results being 43 votes cast against and 34 votes cast in favor of representation. The Union filed timely objections to conduct affecting the election on October 12, 1990, asserting that Respondent engaged in numerous impermissible acts of interference with the employees' freedom of choice in the election, which require that a new election be held. (G.C. Exh. 1j, No. 1.)

The complaint with which said objections case is consolidated for hearing before me alleges that Respondent engaged in threatening conduct against employees because of their support for the Union, including threats of causing employee death or discharge, threats of employees being deported and blackballed to prevent their employment elsewhere, interrogation, unlawful promises, and other forms of coercion in violation of Section 8(a)(1) of the Act.

Based on the entire record, including briefs filed by the parties and the witnesses' demeanor while testifying on the stand, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent produces and distributes a line of giftware including belt buckles, keychains, and decorative glassware fabricated at its plant located in Broadview, Illinois, from which it annually sells and ships products valued in excess of $50,000 directly to points outside Illinois. As is uncontested, I find that Respondent is an employer engaged in commerce within the meaning of the Act, and that the Union is a labor organization as therein defined.

II. UNFAIR LABOR PRACTICES

Counsel for the General Counsel (General Counsel), in support of her complaint allegations, attributes unlawful conduct to Respondent via its former president, John Licht (Licht), Plant Manager Robert C. Stivanson (Stivanson), and Assistant Plant Manager Andres Sarquis (Sarquis), admitted supervisors, as well as to Supervisors Gilberto Vargas (Vargas) and Armando Frias (Frias), whose supervisory status is denied by Respondent. Counsel for Charging Party (Charging Party), alleges further that Marta Gomez (Gomez), leadperson in the color fill department, is also a supervisor as defined by the Act, and that her service along with Vargas as election observers for the Company is objectionable conduct as asserted in union Objection 11.

Supervisory Status

Respondent's work force ranges in size from between 80 to 150 largely Spanish-speaking unskilled employees. Neither Licht nor Stivanson speak Spanish and part of Sarquis' function was to translate for them.

Vargas testified he was in charge of maintenance, and admitted he signed an affidavit stating he was a supervisor in production over the casting, buffing, assembly, and spray areas who gave oral warnings to employees without checking with higher authority. He then stated on the stand that he took care of all those areas. He changed a part of the above affidavit to testify he gave out ''instructions'' to employees in casting, buffing, and spray departments. Employee Froilan Gonzalez, a buffer, worked under Vargas and recalls plant meetings where the managers described Vargas as a supervisor, that Vargas insisted on what work the employees had to do, gave employees oral warnings, and told Gonzalez to tell employees to increase production or be fired. Gonzalez recalls that Vargas directed Gonzalez to work overtime and gave the employee permission to take time off or come in late when Gonzalez once could not come to work, and that he frequently assigned employees from one production area to a different one three to four times a week. Vargas told Froilan Gonzalez to report to him if Gonzalez ever came in late and Gonzalez testified further that Gonzalez considered him a supervisor. Yolanda Casarez, production employee, testified that Vargas, on her first day told her she would work in painting, not production, that he assigned her work and moved her from one station to the other. She recalls Vargas giving her oral warnings telling her if she did not improve she would be fired, and granting her a day off, as well as directing her to work overtime and asking her to work on a Saturday. Vargas also helped new employees fill out applications for employment with Respondent given the candidates difficulty with understanding the forms, and testified that there were times when Sarquis was not present in his department for as long as 20 to 30 minutes, the department consisting Vargas says of some 20 to 30 employees. Vargas as of July 1990 was paid $8 an hour (R. Exh. 3, p. 3); employee F. Gonzalez $4.80 an hour. Francisco Villanueva, also in buffing, testified that Vargas gave him time off, at his request, telling him it was okay and made the decision while the employee was standing there talking to him. Villanueva also related that Vargas asked him to work overtime and had another person bring the buffer employees work to do; further the witness stated that Vargas several times moved employees from one work location to another, between casting and buffing, describing this occurrence as once or twice a week regularly. Stivanson admitted that Vargas can assign work within the buffing ''function'' and that the ''leadpersons'' can move employees around in different jobs within their departments including when there is a fatigue factor or something similar that makes it sense to rotate employees.

Frias selects molds designated in the production schedule for a given day in the casting operation, places molds on the casting lines, and has authority over quality control there. Respondent pays him $6.70 per hour. Respondent's plant manager, Stivanson, and his assistant, Sarquis, introduced Frias to plant employees at a meeting of employees a year preceding the hearing as a supervisor, according to employee Ernestina Casarez. Employee F. Gonzalez also testified to Frias' introduction as a supervisor at company meetings. Frias couldn't recall this happening; Sarquis was not asked to deny the introduction and Stivanson, who does not speak Spanish and could hardly be expected to fully understand the words spoken in Spanish on said occasion, was fed leading questions on the subject so that his denial was unreliable. Employee Roberto Mendoza, a casting employee, is paid $4.50 an hour. He testified that Frias tells employees what to do, that Frias is a supervisor instructing him to fulfill production or face discharge; that once a job is done Frias assigns him another task; and that Frias gives him breaks, checks the time employees come in and out, and moved them from machine to machine on a regular basis; an assertion corroborated by employee Francisco Villanueva.

Gomez. Marta Gomez, 5-year-long ''lead-person'' in color fill is paid $5.95 per hour. Gomez admits that Sarquis tells employees Gomez is going to check their work and is the person who will correct their work performance, including directing them to do the work over. In addition, employee Ana Quintena testified that Sarquis, during four or five meetings with employees told employees to take their problems to Marta as she was a supervisor with an assistant ''Ana''; there being some 30 employees present. Quintena further testified that Marta directed her to prioritize certain work and ordered employees to work elsewhere in the plant, passed out paychecks to employees, assigned work, and granted an employee permission to take a day off on the spot, without consulting elsewhere, in August or September 1990, to Erenia Santiago, as well as granting a day off to employee Celia Guzman to see her physician, again on the spot. Sarquis was not asked to deny Quintena's specific testimony nor was Gomez.

It is undisputed that all three maintain production records relied upon by Respondent to make significant decisions concerning employees the three oversee, such as layoffs; possess and exercise independent authority to grant substantial time off to employees, transfer employees within and outside departments, effectively recommend employees be tried in other positions, assign work, report work deficiencies, are paid substantially higher wage rates than the employees under them, and regularly spend a significant portion of their time in such supervision. Stivanson admitted that the three can speed up or keep production going by moving employees around. It is further established that the three have been continuously and unequivocally held out to the employees and perceived by them as being supervisors which militates in

favor of finding such status. Finally, the ratio of supervisors to employees, 6 to 150, is more akin to reality than 3 to 150, (or 5 to 150 if the sales manager and CEO Roger Little are included in such figures).

Vargas, Gomez, and Frias either did not recall, did not deny, or were not asked to respond to the specifics in the employer's accounts attributing to them examples of their exercise of supervisory authority. Further, they were asked leading questions seeking their denials concerning only their authority in general, and responded to questions woodenly and in a rehearsed manner as if by rote rather than in a genuine or sincere manner as contrasted with the natural—seeming and believable employee accounts. In this connection I note further their tendency to exaggerate and change testimony, Frias testifying incredibly that he never said ''anything'' to any employees, and Vargas testifying he was only a supervisor over machinery and denying he gave employees oral warnings despite his earlier statement in a sworn affidavit that he was a supervisor in production and that, ''If I am having problems in production, I keep records and I have without checking first with Bob [Plant Manager Stivanson] or anyone given verbal warnings to do better.'' (G.C. Exh. 3, p. 1.) Gomez testified at first that employee ''Ana'' was her assistant in the plant only to unpersuasively deny such moments later in her testimony.

I have considered the efforts on brief by Respondent counsel to portray Respondent's operations as streamlined to the point that the overseeing tasks performed by the disputed individuals were only routine, simple or perfunctory as the basis for Respondent's contention the three were nonsupervisory lead persons at best and can find no merit to it. The disputed individuals are shown to have possessed and exercised one or more of the established indicia of supervisory authority, which is sufficient grounds to support a finding of supervisory status as defined by the Act. *Kern Council Services to the Developmentally Disabled*, 259 NLRB 817 (1981); and *Penn Industries*, 233 NLRB 928, 930–931 (1977). The duties performed by them, including even a partial list, assigning work, issuing warnings, transferring employees, correcting their work, granting time off, enforcing production quotas[1] all involved a unit of employees unskilled at Respondent's work and, who, for the most part spoke and understood Spanish alone.

In my view the three had to cope with the achievement of their responsibilities as being the ones to whom employees were told to look to for direction and orders and the fulfillment of production quotas and the granting of time off in so culturally diverse a plant community that the exercise of their supervisory duties even more so than would be the case otherwise, required the use of independent judgement rather than being merely routine in nature. Respondent itself admitted this by its Plant Manager Stivanson's statements on the stand concerning the importance in their ability to communicate to its employees the needs of management and management's need to rely on them in employee evaluation meetings. Based upon the foregoing I find that Vargas, Frias, and Gomez are supervisors as defined in the Act. *Wilco Business Forms*, 280 NLRB 1336, 1340, 1342 (1986); *Armored Transfer Services*, 287 NLRB 1244, 1250 (1988); *Iron Mountain Forge Corp.*, 278 NLRB 255, 259, 262 (1986); *Paintsville Hospital Co.*, 278 NLRB 724, 740 (1986); *Pennsylvania Truck Lines*, 199 NLRB 641, 642 (1972); and *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 10 (1975).

I find no weight to Respondent's argument on brief that the parties agreed to the inclusion of leadpersons in the unit for election purposes so that in effect litigation of their status is now foreclosed. The Board has long required that for such an effect to be achieved there must be a written understanding between the parties expressly foreclosing postelection litigation of issues which could have been presented prior to the election. *Esten Dyeing & Finishing Co.*, 219 NLRB 286, 287 (1975). No such agreement is alleged or submitted in this case, thus there is clearly no impediment to resolving the status of the above individuals.

Respondent's Action Against Employees

The union drive began some time before May 1990[2] after a phone call from a union representative to employee Yolanda Casarez. Towards the end of May, an employee in buffing, Froilan Gonzalez, handed out union pamphlets to 10 employees during his breaktime and while leaving work G.C. 2). A week later his supervisor, Vargas, told Gonzalez while the two were exiting thru the plant door that if he kept up with the Union he could be fired, just like his sister had been fired due to organizing the Union. Respondent in fact had fired Gonzalez' sister that very same week. Vargas could merely not recall any such conversation when questioned on the stand, which left Gonzalez' credible account undenied. Gonzalez served as an assistant or conduit for Vargas, passing on to employees the latter's daily orders. Given their relationship it seems clear that if Vargas had not made such a threat to Gonzalez he would have recalled not doing so and contested the account. Moreover, Gonzalez is credited over Vargas due to the latter's unreliable testimonial performance on the stand as described above. I conclude that Respondent, through Vargas' conduct, thereby coerced an employee to discourage the exercise of employee rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act, both by attributing discharge of an employee to union activities and also by threatening an employee with discharge for such reason. *IMAC Energy*, 305 NLRB 728 (1991); and *Mission Valley Ford Truck Sales*, 295 NLRB 889, 891 (1989).

Later in July Vargas approached production employee Yolanda Casarez in her work area and asked if she was feeling okay, Casarez replying she didn't feel good as Vargas had [put] her apart from the other employees in the plant. Vargas, in reply, told Casarez he couldn't do anything about it—that if she kept up with the Union she was going to be left there. Respondent witnesses Sarquis and Vargas offered no probative testimony to dispute the account of Casarez—Sarquis testifying merely concerning the basis for moving Casarez, and Vargas, rather than being asked what he said on the described occasion being fed lengthy leading questions which, in any event did not altogether track the specifics in the employees's account. I find that the statement by Vargas attributing Respondent's then present and future quarantine-

[1] Employee Roberto Mendoza testified that Frias, ''He would tell me that I had to fulfill the production and that it was suppose [sic] to be from 15 to 16 boxes within the 8 hours.''

[2] Henceforth dates refer to 1990 unless described otherwise.

like action against her to the employee's support for the Union to be coercive conduct in violation of Section 8(a)(1) of the Act, inasmuch as Respondent was, through Vargas, informing the employee it had moved her, undesirably for her, away from other employees—and thus was being hard on the employee—because of her union activities. *Teledyne, Inc*., 246 NLRB 766, 773 (1979).

The Union filed a representation petition on August 1, and on August 23, the parties executed a stipulated agreement for an election to be conducted on October 5.

On an occasion identified approximately as August 23, later recalled as September, shipping employee Ernestina Casarez testified that while waiting to punch out with two shipping employees, called Lucila and Esperanza, Frias approached them and said, ''[A]ll of us that were friends of the union were going to get fired whenever they wanted to and that we were not going to be able to get work anywhere because they were going to get in charge of trying to give us a bad name.'' When Respondent counsel questioned Frias concerning the above, he never asked Frias whether Frias had made such a statement to the three employees, and asked Frias only if Frias had made such comments to *Yolanda* Casarez so that *Ernestina* Casarez' credible account remained undenied. By threatening employees that friends of the union would be fired at will and such employees would be the subjects of Respondent efforts to black-ball them from future employment elsewhere Respondent violated Section 8(a)(1) of the Act. *Mission Valley Ford Truck Sales*, supra; and *Swan Coal Co.*, 271 NLRB 862, 864 (1984).

Company Meetings with Employees Mid-August

Casting employee Roberto Mendoza testified that he attended 4 or 5 meetings called by Respondent and attended by President John Licht, Plant Manager Sarquis, Vargas, and Frias, with some 30 to 40 employees from all the plant departments, during working hours. Licht spoke in English and Sarquis translated. At such a meeting in mid-August Mendoza testified that Licht told employees the Union was not in the employees' best interest because they would lose benefits they already had, holidays, some vacation time, and pay checks would be less due to union quotas (dues) being taken out; that if there were a strike the Union would not pay employees. He recounted that Vargas asked if employees had any problems inside the company, and if they did, to choose a leader and then the leader could go and talk to John Licht, and that in every meeting company officials repeated that employees would lose all of their benefits and the Union was not in their interest so they should ''vote no'' in the election. Licht testified he said benefits could go up or down or stay the same but did not deny the threats attributed to him by Mendoza. He could not recall ''anyone'' saying employees could get their own leader but did not deny this being said by Vargas, who did not contradict Mendoza's testimony. Translator Sarquis could not recall exactly what Licht said, and only testified in reply to leading questions based upon his best memory, without denying the employee's account. His testimony did not track the employee's account and was rendered in a curt, rehearsed manner not responsive to the witnesses' detailed account. Respondent through Licht unlawfully threatened employees with loss of benefits if they voted for the Union. *Sonicraft, Inc*., 295 NLRB 766, 778 (1989). Vargas' encouragement of employees to select their own leader who could bring problems to Licht in the context of Respondent's meeting designed to oppose the union campaign can only be inferred to constitute a solicitation of grievances carrying with it an implied promise to rectify the employee complaints and thereby discourage employee support for the Union and thus Respondent thereby further violated Section 8(a)(1) of the Act. *Dallas Ceramic Co.*, 219 NLRB 582, 586 (1975).

Meeting on September 5

At such a meeting he placed as about a month before the October 5 election, buffing employee Francisco Villanueva corroborated Mendoza's account concerning management's threats by Licht that employees would lose benefits if they supported the Union and related that Licht at the September 5 meeting told employees, ''that perhaps someday we [employees] might come to work and might find ourselves instead on the street with nothing because our company was going to be closed.'' Employee in shipping Ernestina Casarez, describing statements by Licht to some 100 employees at a meeting held approximately the same month wherein among others from Management Sales Manager Jeff Smith attended, recalls that Licht told employees, ''He said that if the union ever made it in they were not going to negotiate and all of us were going to lose our profit sharing check and vacations and all the benefits we already have.'' Licht, fed leading questions, testified without denying the employee's specific account; instead he was merely asked whether there was any ''contemplation'' of moving the plant if the Union came in and he said no. He could not recall mention being made of any specific employee benefits. Smith did not testify. Sarquis was asked, inter alia, the both leading and double-edged question whether there was ever any mention made by Licht ''in the meetings'' about plant *moving* or closing and stated that all the employees attended the meeting ''for a moment.'' His single denial of the leading double-edged question fails to constitute a probative denial, and his continuing exaggeration betrays a bias rendering his testimony unreliable, as will be further evidenced below. By the threats of benefit loss, plant closing, and vow not to negotiate if the Union came in, thereby announcing to employees the futility in their selection of a bargaining agent, Respondent violated Section 8(a)(1) of the Act. *Marriott In-Flite Services*, 224 NLRB 128 fn. 3 (1976); and *Swan Coal Co.*, supra at 866.

Threat of Deportation

Casarez testified that she saw Licht hand out some 100 pamphlets to employees which contain, inter alia, the following: ''ASK GARCIA EXACTLY HOW HIS ILGWU WILL PREVENT THE U.S. GOVERNMENT AND THE IMMIGRATION AND NATURALIZATION SERVICE FROM DEPORTING ALL OF THE ILLEGAL EMPLOYEES THAT WE MIGHT HAVE AT GREAT AMERICAN. HOW IS HE GOING TO KEEP YOU IN THE STATES AND TO CONTINUE MAKING MONEY?'' (G.C. Exhs. 1a, 1b.) Respondent on brief argues that this published communication to employees was a lawful retort to rumors and reports by employees that a union official, Garcia, had assured employees that they would get papers to become legal citizens if the Union was elected and therefore not unlawful, citing *Federal*

Paper Board Co., 206 NLRB 681, 683 (1973). Had Respondent limited its retort to the Union's alleged promise by posing the question in terms which addressed the promise reasonably squarely—for example, ''Ask Garcia exactly how the Union intends to do this'' or the like, I would be inclined to agree. But instead, Respondent posed a question in terms which flagged the threatening specter of deportation right in the employees' minds and went way beyond the boundaries of the cited union promise, thereby losing its protection as a reasonably connected reply. Respondent, I find, exploited the opportunity afforded by Board law to enhance campaign airing of issues legitimately by deliberately exacerbating the fear of certain deportation in the employees' minds. By doing so Respondent coerced its employees in violation of Section 8(a)(1) of the Act. *Mike Yurosek & Sons*, 225 NLRB 148 (1976); and *Amay's Bakery & Noodle Co.*, 227 NLRB 214, 218 (1976).

Further Threats of Discharge and Discrimination

Ana Quintena served as an election observer for the Union and worked as a buckle checker and packer. In mid-September Frias approached her at her work station and without preamble or explanation after doing so, told Quintena she was ''close to the door,'' which meant to her that she was close to leaving the factory, and that he and Marta Gomez were there to make people work. Buffing department employee Francisco Villanueva testified that in mid-September while a passenger in Vargas' van, Vargas said he had seen a union pamphlet containing the employee's name and told him not to sign papers on behalf of the Union because anyway we were going to get fired, all employees who supported the Union. Villanueva recounted that Vargas told him and other named employees in the van that the Company was going to take measures against ''us'' and make sure that ''we'' would never get jobs anywhere in Illinois. Vargas could not recall the statements concerning the union pamphlets, and both Vargas' and Frias' unpersuasive woodenly curt denials to leading questions left the above credible testimony by Quintena and Villanueva intact thereby establishing Respondent's further threats in violation of the Act under the above-cited precedent.

Respondent Burns Employees' Union Hats

Production employee Yolanda Casarez observed Frias approach an employee wearing a hat with the Union's logo on it in her work area 2 weeks before the election held on October 5. She saw Frias take the employee's hat off and burn it. Casarez had distributed the hats to employees after the Union had given them to her, and asked Frias why he had done it. Frias replied that even more was going to happen, that he could burn her hat, whereupon he grabbed her hat and threw it into a large pot used to melt metal. Frias then said more was going to happen to anybody who would try to ''face them.'' Instead of asking Frias to deny the Casarez account, Respondent counsel elicited a different version of the events from him, describing an alleged voluntary handing of the first employee's hat to Frias; who then destroyed the hat; and further that Casarez also gave Frias her hat asking why he didn't burn her hat as well. Respondent put on no corroborating witness to the Frias' testimony although other employees were present on the occasion described by Casarez. It is highly unlikely that the Frias version, under which two employees—one of whom distributed the hats for the Union—would give up their hats freely for burning by Frias allegedly without any conduct by him whatsoever as his version depicts, occurred, and I have not credited him based upon his demeanor and numerous factors throughout his time on the stand described above. I find that without justification of any sort sounding in law or plant practice or operations present or claimed, Respondent discriminatorily destroyed the employees' union-logo-inscribed hats thereby discouraging their activities on the Union's behalf and violating Section 8(a)(1) of the Act. *Halliburton Co.*, 265 NLRB 1154, 1184 (1982).

On October 3 Vargas approached Casarez at her work station laughing derisively at her and told her she wouldn't last 2 weeks after the election; that she would be fired. Vargas was not asked to deny the specifics in the Casarez account; instead, the questions put to him were whether he had *any* conversation with the employee about what would happen to her after the election or wherein she was told she would not last 2 weeks and Vargas replied to these leading questions, that he had not. Respondent in defense on brief argues that Casarez remained employed after the election. I find that such fact in no way lessens the coercive impact in Vargas' threat of discharge of the known union adherent and that Respondent thereby again violated the Act.

Interrogation on Election Eve

On October 4, Respondent's president Licht placed a box of T-shirts bearing a large ''X'' and inscription ''Union-No'' on a table in the factory, the box bearing a sign that said ''Free—Take One.'' Casarez testified that Vargas was telling employees they had to wear the T-shirts so she told employees they didn't have to do so unless they wanted to; whereupon Vargas told her to shut up. Licht flatly denied at first that he had spoken to Vargas when he put the shirts in the plant; however, when pressed with the same question he temporized by asking ''[Did I tell them] . . . Anything at all about them?'' and then said, ''Probably just free for the employees; take one if they want.'' Respondent failed to question or elicit a denial from Vargas concerning any of the thereby undisputed testimony credibly rendered by Casarez. There is no question Respondent placed employees, some who elected to wear the shirts, according to Licht, and some who didn't, alike, in a position of declaring their preference in the election scheduled the next day through the acceptance or rejection of the shirts. Worse, Vargas told employees they had to wear them, compounding the matter with coercion. By such conduct, Respondent violated the Act and provided added grounds for setting the election aside. *Tappan Co.*, 254 NLRB 656 (1981).

The election was held the following day, October 5, Gilberto Vargas and Marta Gomez serving as Respondent's election observers.

Respondent's Postelection Conduct

On October 24 while Vargas was holding a piece of union literature or note and reading the contents to employee Noehmi, Frias grabbed the paper from Vargas and showed employee Ana Quintena the paper asking if it was her signature on it. When she replied yes, Frias said he was really

sorry for her because she was going to be fired and he would make a party for her on the day she left. Frias ''did not remember'' the events described by Quintena, including whether he grabbed the note from Vargas. He then responded in a wooden terse manner to leading questions with a single no. Vargas could not recall the incident either, leaving Quintena's credible account described above untouched and revealing further unlawful conduct by Respondent in the form of unlawful coercive interrogation and threat of discharge in violation of Section 8(a)(1) of the Act.

Threats Against Yolanda Casarez

Three weeks after the election Respondent removed employee stools from their working line and a group of employees with Casarez as spokesperson met with plant management to inquire about the reason. Stivanson told Casarez that Respondent was testing to see if production would increase. He further told her it was not her problem and if she was ever back bringing complaints about such matters Respondent would fire her. Sarquis, who translated Stivanson's remarks, was not confronted squarely with the Casarez account, merely being asked to the best of his memory what had been said and admitting she was told it was not her department. He was then fed leading questions whether the words fired or discharged was used. I do not rely on Stivanson's account in denial because it was Sarquis who did the speaking as far as Casarez' understanding of what was said by management to her on this occasion is concerned, and between Sarquis and Casarez the latter's credible account, corroborated by employee Francisco Villanueva, is credited. Respondent thereby, I find, threatened an employee with discharge because of the exercise of the employee's protected concerted activities concerning employment conditions in violation of Section 8(a)(1) of the Act. Shortly thereafter, on October 31, Casarez testified that she was being yelled at on the production floor by supervision, including Sarquis, Frias, and Vargas. She recalls that Frias shouted he would get back at her, as she ''owed'' him something while simultaneously Vargas yelled at her about speaking to the Union. Absent credible denials by Respondent's supervisors I find that by such conduct described above Respondent harassed an employee because she interfered and meddled in matters which Respondent felt did not concern her but which was protected concerted activity; thereby, Respondent violated the Act. *Lackawanna Leather Co.*, 221 NLRB 355, 359 (1975) (the Cline reprimand).

Vargas continued harassment against Yolanda Casarez—and extended it to include Ernestina Casarez 2 weeks in November, shortly before November 22, driving his van down the street where they lived and somehow broadcasting in a loudspeaker-like manner from the van that the two employees were stupid women and daughters of illegitimate women—stupid for being part of the Union. Ernestina Casarez testified that Vargas made noises duplicating pistol shots and almost ran her over deliberately, afterward Vargas saying that he had already killed her. Vargas was not confronted with the corroborated accounts of the two Casarez employees so his replies on the stand did not constitute persuasive contradictions. More significantly, Vargas was again shown to be untruthful on the stand, for when he was asked whether or not the police had spoken to president Licht concerning the described events; whether or not Licht had told him the police had come to the plant, and whether or not the complaint concerned the broadcasts, in all three instances Vargas replied ''no.'' Yet Respondent's own exhibit file in this case contains memorandum by Licht dated November 26 wherein Licht describes how he spoke to Vargas about the very same matters. Vargas denies Licht ever spoke to him about them, totally discrediting the Vargas denials. The above accounts by the employees establish still further a continuation in Respondent's unlawful conduct. (R. file 16, 17, 18).

While on break on approximately November 11, Yolanda Casarez further stated that Sarquis approached her, pointing his finger at her and yelling it was her fault that the health department official visited the plant and she was guilty of the fact that the Company would be shut down because she was with the Union. Sarquis did not deny her account as he could merely not recall such a conversation on the subject or even whether Yolanda Casarez was present. Frias and Vargas were not asked to deny the incident although both were placed on the scene at the time by Casarez. By blaming Casarez' union support and activities as the reason for a company shutdown Respondent violated Section of 8(a)(1) of the Act by restraining and interfering with her activities. *James K. Sterritt, Inc.*, 215 NLRB 769, 774 (1974) (employee Quick).

Respondent's actions against Casarez became more sinister at the end of November when she complained to Sarquis about being blocked by Vargas in his van at a parking lot after which Vargas yelled at her. Sarquis told the employee she was giving them a lot of problems and asked her if she didn't realize they could kill her. Sarquis did not recall any of the preludes to making the threat as attributed by Casarez. He was not asked about the specific threat described by her; rather Respondent counsel asked whether Sarquis had ever said to her that ''either you or Vargas could kill her?'' This is not the same as the employee's testimony, therefore the threat that Casarez described in her testimony was not denied. The complaint alleged that the threat occurred in November; while General Counsel had directed Casarez' attention to May while eliciting the testimony from her on the stand. I find Casarez was the more trustworthy witness, and her account fits into the environment of threatened violence at the plant shown by the record. Whether or not the threat occurred in May or November—and the latter is the more likely given the flow in all the descriptive testimony and events being addressed during the Casarez account—it was just as highly coercive and as serious a violation of Section 8(a)(1) of the Act.

The Assault on Casarez

Placing the occurrence in February 1991, at a Walgreen's store parking lot, Yolanda Casarez testified that Vargas approached her and said that John Licht asked him to tell her to ''stop this union thing'' and pushed her. Vargas testified that after a brief encounter with Casarez inside the store when she was allegedly ''insulting'' him (the nature of the insults were not described) he paid his bill and left without having any discussion in the parking lot. While he was asked if he touched her or talked to her at all, and said no, he was still asked by Respondent counsel, ''During the course of her conversation did she mention John Licht, and whether there was discussion about some type of charges'' and Vargas said no. For the well-established reasons concerning his lack of

any credibility demonstrated numerous times during the course of his testimony at this hearing, I find that the account of Casarez is the trustworthy one and not the responses of Vargas to indirect questions, mostly leading ones, as to this incident, like others. I find that Respondent's supervisor Vargas assaulted Yolanda Casarez as credibly described by her in a recurring manifestation of animus towards her due to her support for the Union thereby again violating the employee's rights in egregious contravention of Section 8(a)(1) of the Act.

The Representation Case

As noted by the introductory paragraph to this decision, the Regional Director issued an order directing hearing and consolidating the unfair labor practice and objections for hearing, there being certain evidence offered in support of enumerated objections concerning inter alia the Respondent's alleged threatened deportation of employees, interrogation of employees, threatening employees with loss of benefits, threatening employees with refusal to bargain if they selected the Union so that such action by them would be futile, and threatening employees with violence or discharge for supporting the Union, which was coextensive with certain evidence in support of the unfair labor practice allegations in Cases 13–CA–29766, 13–CA–29875, and 13–CA–29905 (G.C. Exh. 1j). In addition the objections also alleged that the Employer used as election observers persons who were either supervisors or persons closely identified with management (G.C. Exh. 1j, No. 11). It is undenied that the Employer selected and used Gilberto Vargas and Marta Gomez as its observers in the election herein. It has been found above that both Vargas and Gomez were statutory supervisors at the time of the election, and on this record there can further be no doubt that both were persons closely identified with management, as well. The use of such observers is a fundamental deviation from the Board's rules which requires the election to be set aside. *Mid-Continent Spring Co.*, 273 NLRB 884 (1984).

Based on the foregoing finding of merit to these election objections, which (aside from the Employer's improper use of observers herein found objectionable separately) generally parallel or mirror the unfair labor practices found to have occurred during the critical period between the filing of the Union's petition on August 1, 1990, and the election held on October 5, 1990, I recommend the election in Case 13–RC–18091 be set aside and the case be remanded to the Regional Director for the conduct of a new election. *Gupta Permold Corp.*, 289 NLRB 1234, 1256 (1988), citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455 (1962).

THE REMEDY

Having found that Respondent committed numerous violations of Section 8(a)(1) of the Act as fully set forth above, I shall recommend issuance of an appropriate cease-and-desist order and a notice posting. These notices are to be printed in both the English and Spanish languages. Because the widespread misconduct engaged in by the Respondent clearly ''demonstrates a general disregard for employees' fundamental statutory rights,'' I shall recommend a broad cease-and-desist order. See *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Great American Products, Broadview, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to fire employees because they support the Union or telling employees that any employee was fired for organizing the Union.

(b) Threatening to keep an employee stationed apart from other employees because of the employee's support for the Union.

(c) Telling employees that friends or supporters of the Union would be fired whenever Respondent wanted and would not get work in Illinois or elsewhere because Respondent would give them a bad name, and take measures against them.

(d) Threatening employees by telling them they would lose all the benefits they already had such as holidays, vacation pay, and profit-sharing checks if the Union came in.

(e) Soliciting employee grievances and promising to resolve employee problems by asking employees to appoint a leader to present their problems to Respondent for the purpose of discouraging employees' support for the Union.

(f) Threatening employees that the Company would be closed and employees out on the street in order to discourage employee support for the Union.

(g) Telling employees that if the Union ever made it in the Company would not negotiate a contract and employees would lose all their benefits.

(h) Threatening employees directly or indirectly with deportation in order to discourage support for the Union.

(i) Forcibly removing employees' union insignia-bearing hats and destroying them by burning, and threatening employees that even more was going to happen to anyone who confronted Respondent, in order to discourage employees' support for the Union.

(j) Coercively interrogating employees concerning their support for the Union by distributing T-shirts inscribed with a ''Union-No'' inscription bearing a large ''X'' requiring employees to disclose their union sentiments.

(k) Requiring employees to wear T-shirts bearing a ''vote no'' slogan against the Union, thereby coercing employees in the free exercise of their rights under Section 7 of the National Labor Relations Act.

(l) Threatening any employee with discharge, or yelling at any employee with unspecified threats to get back at the employee, because the employee engaged in protected concerted activity.

(m) Harassing employees because of their support for the Union by driving a van in front of their residence and broadcasting insults against them, or saying Respondent had killed any such employee because of the employees' support for the Union.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(n) Accusing an employee of being guilty and responsible for the department of health visit and that as a result the Company would be shut down because the employee was with the Union.

(o) Threatening to kill an employee because of the employee's union activities.

(p) Assault and battery against an employee by pushing the employee and telling the employee to ''stop this Union thing.''

(q) Assaulting any employee by attempting to run over the employee with a motor van because of the employee's union activities.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Act.

2. Take the following affirmative action necessary effectuate the policies of the Act.

(a) Post at its Broadview, Illinois, facility copies of the attached notice marked ''Appendix.''[4] The notice is to be printed in both the English and Spanish languages. Copies of the notices on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that any complaint allegations not withdrawn earlier with my approval at the hearing and not herein specifically found to be a violation be dismissed.

IT IS FURTHER ORDERED that the election in Case 13–RC–18091 be set aside for the reasons addressed in the body of this decision, and that that case be remanded to the Regional Director for Region 13 for the purposes of conducting a new election.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to fire employees because they support the International Ladies Garment Workers Union, Local No. 76, AFL–CIO, or any other union, or tell employees that any employee was fired for organizing the Union.

WE WILL NOT threaten to keep an employee stationed apart from other employees because of the employee's support for the Union.

WE WILL NOT tell employees that friends or supporters of the Union will be fired whenever we want and will not get work in Illinois or elsewhere because we will give them a bad name and take measures against them.

WE WILL NOT threaten employees with loss of all their benefits such as holidays, vacation pay, and profit-sharing checks if the Union comes in.

WE WILL NOT solicit employee grievances and promise to resolve their problems by asking employees to appoint a leader to present such problems to us in order to discourage employees' support for the Union.

WE WILL NOT threaten employees that the plant will be closed and employees out on the street in order to discourage employees' support for the Union.

WE WILL NOT tell employees that if the Union ever made it in the Company would not negotiate a contract and employees would lose all their benefits.

WE WILL NOT directly or indirectly threaten our employees with deportation to discourage support for the Union.

WE WILL NOT forcibly remove employee hats bearing insignia supporting the Union and destroy them, or tell employees that even more was going to happen to anyone who confronted Respondent in order to discourage employees' support for the Union.

WE WILL NOT coercively interrogate our employees concerning their union sentiments by providing shirts bearing written inscriptions to ''vote no'' against the Union to them, or require that they wear such shirts.

WE WILL NOT threaten any employee with discharge or unspecified threats because the employee asks us about the removal of stools from the work area on behalf of other employees or engages in any other forms of protected concerted activity.

WE WILL NOT drive a motor van in front of any employees' residences and broadcast insults against employees or say that we killed any employee in order to harass them because of their support for the Union.

WE WILL NOT accuse an employee of being guilty for causing a visit by the department of health and that the Company would shut down because the employee was with the Union.

WE WILL NOT threaten to kill any employee because of their union activities.

WE WILL NOT assault and batter any employee by shoving the employee in order to stop their activities on behalf of the Union.

WE WILL NOT attempt to run over any employee with a motor van because of such employee's support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GREAT AMERICAN PRODUCTS